

**California Regional Water Quality Control Board
San Diego Region**

MEMO

TO: Michael P. McCann
Assistant Executive Officer

FROM: Jeremy Haas
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DATE: May 6, 2009

**SUBJECT: Summary of Issues Raised by SOCWA Regarding
ACL Complaint No. R9-2009-0028**

This memo summarizes arguments raised by the South Orange County Wastewater Authority (SOCWA) in response to ACL Complaint No. R9-2009-0028. On April 24, 2009, SOCWA submitted documents to support its position opposing the administrative assessment of mandatory minimum penalties (MMPs). The tentative MMPs result from violations of effluent limitations in discharges from the South Coast Water District (SCWD) Groundwater Recovery Facility (GRF) into the San Juan Ocean Outfall, which is a combined outfall owned by SOCWA.

SOCWA is not contesting the occurrence of the violations, but is challenging both the NPDES requirements and the finding that the violations are not subject to statutory exemptions from MMPs. The arguments raised by SOCWA do not affect the previous recommendation to impose the MMPs.

SOCWA's Arguments, Followed By Responses from the Prosecution Team

1. The NPDES Permit Should Not Have Been Amended to Require Sampling at the GRF Rather Than at the Outfall.

Response: This issue is outside the scope of the hearing, and it is an issue that was considered during the adoption process of the 2006 NPDES Permit. It is not relevant to the administrative assessment of MMPs. The point of compliance for each facility subject to the NPDES permit is appropriately selected as each facility's outfall, prior to mixing with other flows, in order to assess the implementation of technology to reduce the pollutants at each facility.

2. The GRF Brine Effluent Did Not Impact the Outfall.

Response: MMPs in the ACL Complaint apply to violations of effluent limitations prescribed for the discharge from the GRF, not for discharges from the commingled Ocean Outfall. Separate effluent limitations are prescribed in the NPDES permit for the discharges from the commingled Ocean Outfall.

3. Other NPDES Permits Allow Brine Discharges to be Blended at Outfalls.

Response: This issue is outside the scope of the hearing, and it is an issue that was considered during the adoption process of the 2006 NPDES Permit. It is not relevant to the administrative assessment of MMPs.

4. Other NPDES Permits Have Allowed Other Standards Appropriate for Non-Municipal Discharges.

Response: This issue is outside the scope of the hearing, and it is an issue that was considered during the adoption process of the 2006 NPDES Permit. It is not relevant to the administrative assessment of MMPs.

5. Discharging the Brine Effluent into the Outfall is the Best Option under the Circumstances.

Response: This is not relevant to the administrative assessment of MMPs. Technology-based NPDES effluent limitations were established for brine discharges from the facility based on Table A of the California Ocean Plan. It is expected that operators of the facility would consider those effluent limitations when evaluating options for the disposal of brine.

6. Mandatory Minimum Penalties Should Not Apply to Groundwater Recovery Facilities Given Public Policy Considerations.

Response: MMPs are required by California Water Code (CWC) section 13385(h) and (i) for specified violations of NPDES permits. There is no statutory exemption for groundwater recovery facilities.

7. The Regional Board has the Discretion to Waive the Initial Violations of the NPDES Permit During the GRF's Start-Up Period of Adjusting and Testing.

Response: SOCWA did not meet the statutory requirements of CWC section 13385(j)(1)(D) for MMP exemptions during a facility's start-up period.

8. SCWD Should Have Had the Opportunity to Enter into a Time Schedule Order.

Response: CWC Section 13385(j)(3) provides an MMP exemption for facilities discharging in compliance with an adopted Time Schedule Order (TSO) if certain statutory conditions are met. SCWD did not apply for or receive a TSO. On September 18 2008, SCWD discussed the TSO process with Regional Board staff. By that time, 56 of the 68 MMP violations had already occurred. Five MMP violations occurred 12 days later, and the remaining seven violations occurred four weeks after the meeting. Given that most violations already occurred, and subsequent violations occurred shortly thereafter, a TSO could not have feasibly been adopted before the discharges subject to the MMPs occurred. Furthermore, there is no legal support for interpreting section 13385(j)(3)'s exemption from MMPs as being allowed to have a retroactive application allowing an exemption from MMPs for effluent violations that occurred prior to the adoption of a TSO. CWC section 13385(j)(3) exempts a discharger from MMPs for effluent limitation violations only if the waste discharge "is in compliance with a time schedule order." A waste discharge cannot be in compliance with a TSO until that TSO has been issued.

9. The Imposition of Mandatory Minimum Penalties in this Case Raises Due Process Considerations.

Response: SOCWA argues that the assessment of statutorily-required MMPs is unreasonable and violative of due process. The arguments are without merit. First, SOCWA asserts that there was no, or minimal, harm associated with the discharges. However, the Water Code makes no such exemption for MMPs. Second, SOCWA wrongly suggests that a single sample collected to evaluate compliance with multiple effluent limitations should only be subject to a single MMP. SOCWA chose to use a single sample event to determine compliance with instantaneous, weekly, and monthly effluent limitations, but was under no obligation to do so. Third, SOCWA suggests that the assessment of MMPs is unreasonable because SCWD received no economic benefit from the violations. In this case, economic benefit was not calculated because it is a statutory consideration for assessment of discretionary administrative civil liability, but not for MMPs. There are currently no statutory MMP exemptions or reductions based on economic benefit.

Conclusion of the Prosecution Staff

None of the issues raised by SOCWA warrant reconsideration of the Board's statutory requirement to assess the MMPs alleged in Complaint No. R9-2009-0028.